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Supreme Court, U.S.
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No. 97-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION,

AMERISOURCE CORPORATION, et al.,

Petitioners,

v.

HJB, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

The question stated in the petition for writ of certiorari is not an accurate statement of any issue presented in this case. The proper statement of the issue presented by the decision of the court of appeals is: Does the evidence presented to the district court show the existence of a genuine issue of fact as to whether the Petitioners, wholesalers of brand name prescription drugs, participated in a conspiracy with pharmaceutical manufacturers to fix and maintain the prices paid by retail pharmacies?

RULE 29.6 STATEMENT

This Brief in Opposition is filed on behalf of several companies, all of which are named plaintiffs and class representatives in the class action pending in the district court. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Class Plaintiff Respondents state:

a. This Brief in Opposition is filed on behalf of the following corporations:

Endlers' Pharmacy, Inc.

Barry's Cut Rate Stores, Inc.

Brady's Pharmacy, Inc.

Brady's Enterprises, Inc.

Conney's Pharmacy, Inc.

Meyers Pharmacy, Inc.

Strathmore Pharmacy, Inc.

Pat-Y-Ken Drug, Inc.

Starko, Inc.

Lurie Pharmacy, Inc.

b. None of the corporations listed in paragraph (a) of this Statement has a parent company.

c. None of the corporations listed in paragraph (a) of this Statement has any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Respondents are retail pharmacies which have brought antitrust claims against the leading manufacturers and wholesalers of brand name prescription drugs.[1] In this lawsuit, the plaintiff retailers charge the manufacturers and wholesalers with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, through a conspiracy to fix and maintain the prices paid by retailers. Jurisdiction in the district court was based, *inter alia,* on 28 U.S.C. § 1331. This Petition arises from interlocutory appeals of the April 4, 1996 rulings of the district court on defendants' motions for summary judgment.

In response to those motions, the retailers submitted compelling proof of a conspiracy in this industry to fix and maintain prices to retailers. The evidence showed that manufacturers and wholesalers frequently met to discuss their fear that aggressive price competition would spread to the retail sector, the largest sector of the market, and that these defendants reached a consensus to hold the line on this spread. (48a, 53a-56a, 58a-60a)[2] The evidence shows that the defendants refused to offer discounts to retailers, with a consistency, vigor and absoluteness that allowed no plausible explanation other than conspiracy. (52a-53a) The defendant manufacturers had suggested a possible nonconspira-

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[1] This petition was filed by the wholesaler defendants. A companion petition for a writ of certiorari has been filed by several of the manufacturer defendants, and is currently pending under the caption *Abbott Laboratories v. HJB, Inc.*, No. 97-1152.

[2] Citations in the form "__a" refer to pages of the Appendix to the Petition For Writ of Certiorari. No separate appendix accompanies this Brief for Respondents in Opposition.

torial explanation for their uniform refusals to discount—that retailers lacked the ability to increase the market shares of the defendants' products—but the evidence submitted by plaintiffs showed that this was not a reasonable and valid explanation for the defendants' actions. (65a-69a)

On the strength of this evidence, the district court denied the summary judgment motions of the manufacturer defendants. The district court found the record "replete with instances of collusive behavior, parallel conduct, uniformity of responses, mutual awareness of each others' policies and practices and incriminating quotes on the part of the defendants." (69a) The district court concluded:

> In spite of evidence that the retailers could move market share (in some cases, better than the preferred customers), the defendants uniformly persisted in their refusals to extend discounts to this entire segment of the market. Portions of the record belie the defendants' contention that the retailers refused the benefits of preferred customer status on account of the retailers' inability to influence the market. To the contrary, as discussed above, the record suggests that, having succumbed to the pressures of managed care, the manufacturers together set out to impose artificially high prices on the retail customers in order to retain their high profit margins. (70a)

The district court then proceeded to grant the summary judgment motion of the wholesaler defendants, the Petitioners now before this Court. In granting this motion, the district court reviewed the evidence and concluded that the price-fixing conspiracy was essentially

imposed on the wholesalers. "Recognition of the economic power of the manufacturers is apparent throughout this record, as is the wholesalers' grudging accession to some of the manufacturers' practices." (92a) Such "grudging accession" was not enough, the district court ruled, to hold the wholesalers liable as coconspirators, and it dismissed the claims against them. Subsequently, the district court issued a final judgment, pursuant to Fed. R. Civ. P. 54(b), on its dismissal of the claims against the wholesalers. Plaintiffs appealed that judgment to the United States Court of Appeals for the Seventh Circuit.

The manufacturers did not appeal the denial of their summary judgment motions. The court of appeals considered only the grant of summary judgment for the wholesaler defendants, reversed that judgment and reinstated the claims against these defendants. *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997). In reaching that decision, the court of appeals resolved no issues of law. It merely assessed the evidence in the record and found that a reasonable jury, instructed on established rules of law regarding proof of a conspiracy, could find that these wholesalers had given affirmative support and assistance to the scheme to maintain the prices paid by retailers, enough assistance to deem the wholesalers liable as coconspirators. The court of appeals noted evidence "of a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledge to adhere to the chargeback system." 123 F.3d at 614.

The court remanded the case to the district court for trial. The district court has scheduled a September, 1998 trial on the claims of the class plaintiffs against the manufacturers and the wholesalers.

REASONS FOR DENYING THE PETITION

The foundation for this Petition is a false description of the decision of the court of appeals. According to the Petition, the court of appeals deemed inapplicable and disregarded the holding in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." The court of appeals made no such ruling. It applied *Matsushita* in a straightforward manner, adopting no construction of the case that even arguably conflicts with decisions of this Court or with decisions in other circuits. In an effort to find a legal issue worthy of review, Petitioners have presented this Court with a blatant misrepresentation of the decision below.

In fact, no significant legal issue is raised by the decision of the court of appeals to reverse the grant of summary judgment for the wholesaler defendants. The decision involved little more than a review of the evidence, which the court found sufficient to create a triable issue of fact as to whether the wholesaler defendants had joined in the manufacturers' price-fixing conspiracy. Petitioners disagree with that finding, but review in the Supreme Court is not justified for the reasons stated below.

I. Certiorari should be denied because this is an interlocutory appeal.

By vacating summary judgment, the court of appeals decided only that a trial may proceed on the price-fixing case against the wholesalers. The wholesalers might prevail on the merits of that trial, in which case they would have no need to seek review in this Court. Alternatively, the jury might find the wholesalers liable, and the wholesalers then could seek review of the verdict against them, but in that situation the more fully developed record produced by the trial would offer a better means to determine if a legal issue deserving of review is present and to decide any such issue if review were granted. The usual practice of this Court is to decline to review interlocutory decisions. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR*, 389 U.S. 327, 328 (1967). Nothing about this case warrants a departure from that practice.

II. The Petition presents an inaccurate statement of the decision below and asks this Court to review an issue not presented by this case.

This Petition rests entirely on a false description of the decision of the court of appeals as having adopted a particular interpretation of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The question that Petitioners ask this Court to review is not presented in this case.

Petitioners are unwilling to rely on the words used by the court of appeals to state its own ruling. In present-

ing how the court of appeals interpreted and applied *Matsushita*, the Petition never quotes any full sentences from the paragraphs that actually discuss *Matsushita*. Instead, it quotes some small snippets from the appellate opinion, but essentially gives its own version of the decision below. The most complete statement of Petitioners' version of events appears on page 11:

> The majority of the courts of appeals interprets the *Matsushita* standard in accordance with its terms and grants summary judgment to defendants if the evidence is "consistent with permissible competition," even if the alleged conspiracy is economically plausible. In contrast, a minority of the circuits, joined by the Seventh Circuit in this case, has held the rule of *Matsushita* inapplicable when the alleged conspirators had a plausible reason to conspire. (Petition 11)

The first sentence of this passage refers to a passage in *Matsushita* holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. This was a reiteration of the rule that the Court had adopted two years earlier in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). According to the Petition, the court of appeals held this rule "inapplicable when the alleged conspirators had a plausible reason to conspire." (Petition 11)

But this is not how the court of appeals decided this case. To remove all doubt about the court's actual ruling, we quote in full the passage of the opinion that addresses *Matsushita*:

> But they [the wholesaler defendants] argue, pointing to *Matsushita* and other decisions by the Supreme Court and this court, that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467-69, 112 S.Ct. 2072, 2082-83, 119 L.Ed.2d 265 (1992); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). This has to be the right rule, given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action. (123 F.3d at 614)

Having made these references to *Matsushita*, the court of appeals then proceeded to a discussion of the evidence to show "that the defendants are wrong to argue that it would make no sense for the wholesalers to conspire with them to fix the prices of pharmaceutical drugs." *Id.* at 614. This is all that the court of appeals had to say about *Matsushita*.

The Petition clearly misstates this ruling. The court of appeals is not referring to the part of *Matsushita* that Petitioners discuss, the reiteration of the rule of *Monsanto* about inferring conspiracy from ambiguous evidence. The reference of the court of appeals, rather, is to a passage appearing earlier in the *Matsushita* opinion concerning the plausibility of the theory of conspiracy advanced by an antitrust plaintiff: "It follows from these

settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support the claim than would otherwise be necessary." 475 U.S. at 587. The court of appeals left no doubt that this rule of *Matsushita* is applicable to an antitrust case of this type without any qualification ("This has to be the right rule."). Petitioners had relied on this passage in one of their arguments in their appellate brief, and the court of appeals responded by showing that the facts did not support the argument.

III. The court of appeals applied *Matsushita* correctly.

The only question presented by the decision of the court of appeals is whether it correctly found the evidence sufficient to create a genuine issue of fact as to whether the wholesaler defendants had joined in the manufacturers' price-fixing conspiracy. Petitioners disagree with that decision and contend that it "cannot be reconciled with this Court's decision with *Matsushita*" (Petition 2), but those arguments do not justify review in this Court. "A Petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Moreover, the decision of the court of appeals was not erroneous. It was plainly correct.

There was no dispute in the court of appeals regarding the existence of a price-fixing conspiracy involving at least the manufacturers. The district court had denied

the manufacturers' motion for summary judgment, finding the evidence sufficient to prove that "having succumbed to the pressures of managed care, the manufacturers set out to impose artificially high prices on the retail customers to retain their high profit margins." (70a) That decision was not part of the appeal. 123 F.3d at 604. The issue on appeal was whether the evidence was sufficient to find that the wholesalers were a part of this conspiracy. 123 F.3d at 614-15.

The court of appeals found that "the record discloses a number of instances in which officers of the defendant wholesalers urge manufacturers to hold the line against discounting to pharmacies and their buying groups, and pledged to adhere to the chargeback system" 123 F.3d at 614, and the record contains a wealth of evidence to support that finding. (49a-78a) These wholesalers gave critical support to the manufacturers' price-fixing conspiracy, the evidence shows that they did, and they should be required to face that evidence at trial.

Nothing in this ruling is inconsistent with any part of *Matsushita*. It is faithful to the holding of *Matsushita* that conspiracy may not be inferred "in the absence of a plausible motive" to enter the conspiracy. The wholesaler defendants had very clear motives to enter and support the manufacturers' conspiracy. "Buying groups frequently act as their members' wholesaler," as the court of appeals explained, "buying directly from the manufacturer and thus cutting out independent wholesalers." 123 F.3d at 614. The wholesalers helped to head off this threat when they "joined with the manufacturers to hold the line against granting any discounts to such groups and so discourage their formation by reducing

the advantages of membership." *Id.* The wholesalers also had a motive to support the conspiracy by expanding the use of chargebacks, which gave them "a piece of the action with the favored customers, who were proliferating." *Id.*

These facts distinguish *Matsushita*, in which the defendant Japanese electronics manufacturers were charged with scheming to drive their American competitors out of business through two decades of predatory pricing. The court found that these defendants had "no motive to enter the alleged conspiracy," but rather "as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gain." 475 U.S. at 595. The facts in this case are different; Petitioners enjoyed direct and immediate benefits from their participation in the conspiracy: protection from retail buying groups and access to favored customers.

The decision of the court of appeals also is consistent with the holding in *Matsushita* regarding ambiguous evidence of conspiracy:

> But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764, 104 S.Ct., at 1470. See also *Cities Service, supra,* 391 U.S., at 280, 88 S.Ct., at 1588. To survive a motion for summary judgment or

> for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471.

The record in this case includes a wealth of evidence of wholesaler participation in the conspiracy that easily passes these requirements.

This evidence includes proof that the wholesalers used the forum of their trade association, the NWDA, to hold discussions on how to respond to retail buying groups and that they made requests of manufacturers not to bid to these buying groups at meetings of the NWDA and through its staff. (53a-54a) This evidence is not ambiguous. It is not "as consistent with permissible competition as with illegal conspiracy." Competitive firms do not join together to ask their suppliers to refuse to bid to other competitors; only firms seeking to prevent competition take such actions. This is the very kind of proof that *Monsanto* and *Matsushita* envision as sufficient to create a genuine issue of fact.

Petitioners argued to the court of appeals, as they do now, that the communications between the wholesalers and the manufacturers regarding bids to buying groups are no different from the complaints about price-cutters, which "the Court in *Monsanto* held inadequate (standing alone) to support the plaintiffs' claim."[3] (Petition 24) The

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[3] The Petition attempts to squeeze this case into the *Monsanto* mold by describing the communications of the wholesalers as "unilateral urgings" (Petition 24), but the evidence shows that in most instances where the wholesalers requested

(continued...)

evidence here shows much more than simple complaints to a supplier about price-cutters. It shows the wholesalers soliciting and receiving commitments from manufacturers that they would not bid to buying groups. (27a-28a, 53a-54a)

Similarly, with regard to the chargeback system, Petitioners invoke *Monsanto* for the proposition that "a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto,* 465 U.S. at 761. The evidence in this case shows not that the wholesalers acquiesced in a demand that they use the chargeback system, but that they took an active role in developing this system and promoting its wider use, so that they might get, as the court of appeals observed, "a piece of the action with the favored customers." 123 F.3d at 614.

The bottom line is that the "innocent interpretations" suggested by Petitioners are not necessarily correct. A reasonable jury could reject these suggested "interpretations" in favor of facts that are more firmly grounded in the evidence and not consistent with permissible competition. This plainly is what the court of appeals meant when it concluded that the "defendants' interpretations may be correct; they are not inevitable." 123 F.3d at 614.

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[3] (...continued)
the manufacturers to refrain from bidding to buying groups, the wholesalers were acting in groups at trade association meetings. (53a-54a)

Petitioners object to the construction of the evidence favorably to the plaintiffs (Petition 2, 9, 20), but this clearly is the correct standard. In *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), this Court held that on "summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." This Court affirmed that this standard applies to antitrust cases in *Matsushita*, 475 U.S. at 587, and again in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992).

Petitioners also complain that the "Seventh Circuit did not take issue with *any* of the district court's specific factual findings." (Petition 23) This complaint reflects a misunderstanding of the standard of review. The court of appeals reviews a grant of summary judgment *de novo*, considering the evidence on its own to determine whether it contains enough for a reasonable jury to find in favor of the party opposing summary judgment. *Johnson v. Jones*, 515 U.S. 304, 306 (1995). When an appellate court determines that a genuine issue of fact exists, as the court of appeals did here, it has only to vacate summary judgment and leave the fact-finding to the jury. The court of appeals does not sustain or vacate "the district court's specific factual findings."

Finally, lacking any substantial grounds to charge the court of appeals with error, the Petitioners resort to charging the members of the appellate panel with a dereliction of their responsibilities as judges. They claim that the court of appeals "simply brushed aside" their arguments (Petition 20), and then add: "Chief Judge Posner's opinion for the Seventh Circuit thus devoted

far more attention to a theoretical analysis of the plausibility of the plaintiffs' economic construct than to the nitty-gritty of the record." (Petition 21) "That led," Petitioners say, "to a lengthy flight of fancy in which the Seventh Circuit repeated plaintiffs' speculation." (Petition 21-22) In a footnote, Petitioners add a sanctimonious conclusion: "The court's theoretical bypass of the record was plainly inconsistent with its role. An appellate court considering a summary judgment issue must engage the record . . . ." (Petition 21 n. 9)

There is absolutely no basis for this charge. The court of appeals vacated summary judgment on grounds that are fully supported by evidence in the record. Petitioners no doubt are disappointed that the court of appeals did not decide the case as they wished, and perhaps they are not pleased by the colorful language ("tasty morsels") that is typical of Chief Judge Posner's style. But there is no justification for making an unfounded charge that Chief Judge Posner and his colleagues on the appellate court panel "bypass[ed] the record" and engaged in a "flight of fantasy". Such attacks on members of the federal judiciary have no place in a filing in this Court.

IV. The circuits are not split over the meaning of *Matsushita*.

According to the Petition, a "majority" of the circuits applies as written the holding in *Matsushita* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy," 475 U.S. at 588, and applies this rule even when the conspiracy would serve the defendants' interests. (Petition 11) The circuits that

comprise this "majority," the Petition says, include the Second, Fourth, Fifth, Eighth, Tenth and Eleventh. (Petition 12)

The Seventh Circuit belongs in this list. The leading decision of the Seventh Circuit on the application of *Matsushita* is *Market Force Incorporated v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990), which adopted "a two-part inquiry to determine whether summary judgment is appropriate in an antitrust conspiracy case," *id.* at 1171, as follows:

> "(1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." *Id., quoting Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987).

The two-part inquiry of *Market Force* is essentially a verbatim restatement of *Matsushita*. The Seventh Circuit has applied *Market Force* without recognizing any exceptions or limitations of the kind discussed in the Petition. *See, e.g., Serfecz v. Jewel Food Stores*, 67 F.3d 591, 599 (7th Cir. 1995); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 48-49 (7th Cir. 1992). The decision in this case certainly recognizes no exception. *See* pages 6-7, 10-11 above.

Indeed, the Seventh Circuit anticipated *Matsushita* and *Monsanto*. In *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982), which involved a claim that competing distributors had conspired with their supplier to terminate a price-cutting competi-

tor, Judge Posner ruled that the claim required proof that the supplier "was acceding to [the other conspirators'] desires rather than acting to promote an independent conception of its self-interest." *Id.* at 744. *See also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 660 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (*Matsushita* "is the standard that Judge Posner appears to have articulated in Valley I"). To characterize the Seventh Circuit, and Chief Judge Posner in particular, as renegades who are disregarding *Matsushita* in the hopes of opening the floodgates to frivolous antitrust claims is frankly absurd.

Petitioners' suggestion of a split in the circuits ultimately comes down to their disagreement with decisions from two other circuits: the Third, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993), and the Ninth, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991). Even if these cases are inconsistent with the decisions in other circuits, and it is not clear that they are inconsistent, they do not supply a reason for granting review of this case. As the citations indicate, this Court did not find an issue worthy of review in any of them; it denied certiorari in each one of them. Moreover, the court of appeals in this case did not follow these Third and Ninth Circuit decisions, it did not cite them, and it issued no ruling that suggests any conflict with any other circuits. This

case offers only the opportunity for the Court to review the evidence in this case prior to trial, which is not a good reason for this Court to grant the case a place on its limited docket or to add yet another year of delay to the trial of this already protracted litigation.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

February 11, 1998

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